

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AMERICAN FOREST RESOURCE COUNCIL *et al.*,

Civ. No. 02-06087-AA

Plaintiffs,

v.

SECRETARY OF THE INTERIOR,

Defendant,

and

AUDUBON SOCIETY OF PORTLAND *et al.*,

Defendant-Intervenors.

) **SETTLEMENT**
) **AGREEMENT AND**
) **STIPULATION OF**
) **DISMISSAL WITH**
) **PREJUDICE**
)

)

)

This Settlement Agreement is entered into by and between American Forest Resource Council, Starfire Lumber Company, Herbert Lumber Company, and C&D Lumber Company (jointly referred to as "AFRC") and the Secretary of the Interior, through the U.S. Fish and Wildlife Service ("the Service" or "FWS").

WHEREAS, on October 1, 1992, the Service listed the Washington, Oregon and California population of the marbled murrelet ("the Murrelet") as a threatened species under Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533, 57 Fed. Reg. 45328; and

WHEREAS, subsequent to the adoption of the Murrelet listing decision, on February 7, 1996, the Service issued a Policy Regarding the Recognition of Distinct Population Segments Under the Endangered Species Act ("1996 DPS Policy"), 61 Fed. Reg. 4722; and

WHEREAS, on May 24, 1996, the Service designated critical habitat for the Murrelet under Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), 61 Fed. Reg. 26255; and

WHEREAS, the Tenth Circuit Court of Appeals issued a decision in New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service, 248 F. 3d 1277 (10th Cir. 2001), which addresses the proper scope of the analysis of economic impacts under ESA Section 4(b)(2) in designating critical habitat; and

WHEREAS, the Service's analysis of the potential economic impacts of designating Murrelet critical habitat is in some respects inconsistent with the decision in New Mexico Cattle Growers Association; and

WHEREAS, AFRC has filed a case in the United States District Court for the District of Oregon captioned American Forest Resource Council v. Secretary of the Interior, Civ. No. 02-06087-AA (D. Or.) ("the Murrelet Case"); and

WHEREAS, the Complaint in the Murrelet Case asserts six claims for relief alleging the Service violated the ESA and the National Environmental Policy Act ("NEPA"), 16 U.S.C. § 4321 *et seq.*, in connection with the critical habitat designation for the Murrelet and the alleged failure of the Service to conduct a review of the status of the Murrelet in accordance with the requirements of Section 4(c)(2) of the ESA, 16 U.S.C. § 1533(c)(2); and

WHEREAS, the Service has filed an Answer to the Complaint, denying all such allegations; and

WHEREAS, it is in the interests of the public and the Parties, and judicial economy, to resolve the claims in this lawsuit without protracted litigation;

NOW THEREFORE, the Parties agree as follows

1 Five Year Review: The Service will conduct a review of the Murrelet in accordance with ESA Section 4(c)(2) (hereinafter referred to as the "Section 4(c)(2) Review") in accordance

with the following schedule

a. By no later than sixty (60) calendar days from the Effective Date of this Agreement, the Service will submit to the Federal Register for publication a notice announcing commencement of the Murrelet Section 4(c)(2) Review and soliciting information thereon; and

b. By December 31, 2003, the Service will complete the review and will, based upon the best available scientific and commercial data, determine whether a change in listing status is warranted, as provided by Section 4(c)(2).

2 Critical Habitat Designation: The Service will conduct a rulemaking to consider potential revisions to Murrelet critical habitat in accordance with ESA Section 4(b)(2) and 4(a)(3)(B) (hereinafter referred to as the "Critical Habitat Rulemaking") in accordance with the following schedule:

a. By August 30, 2006, the Service will submit to the Federal Register for publication a proposed regulation setting forth any revisions to the Murrelet critical habitat deemed appropriate by the Service that is consistent with the statutory and regulatory criteria applicable to designations of critical habitat under ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2). In accordance with ESA Section 4(b)(2), the Service's review of critical habitat will include a revised consideration of economic impacts and any other relevant impacts of designating any particular area as critical habitat; and

b. By August 30, 2007, the Service will submit to the Federal Register for publication any final regulation revising Murrelet critical habitat the Service deems appropriate based on the proposal described above.

3 The Parties agree that this Settlement Agreement was negotiated in good faith and

that it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the Parties. By entering into this Agreement, neither Plaintiffs nor Defendant waive any claim or defense on any grounds.

4. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded the Service by the Endangered Species Act or by general principles of administrative law.

5. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that Defendant obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation. Nothing in this Agreement alters the Service's obligation to act in a manner consistent with all applicable law, including the notice and comment and other provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, and federal appropriations law.

6. The terms of this Agreement constitute the entire agreement of the Parties with regard to AFRC's claims set forth in the Murrelet Case, and no statement, agreement or understanding, oral or written, which is not contained herein, shall be recognized or enforced.

7. Upon approval of this Agreement, AFRC's Complaint in the Murrelet Case shall be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1). This Court shall retain jurisdiction to consider any motions filed with regard to any application for attorney's fees. The Court shall also retain jurisdiction to consider any motion to enforce this Settlement Agreement. At least 30 days prior to filing any motion to enforce this Settlement Agreement, the Party contemplating the action must bring its dispute to the attention of the other Parties, in writing, and all Parties must make a good faith effort to resolve the dispute informally. No Party seeking to

enforce this Agreement shall invoke the contempt powers of the Court in aid of enforcement of this Agreement, provided this Agreement does not otherwise limit the enforcement powers of the Court.

The Parties recognize that this Agreement requires certain procedures only and does not limit the Service's authority with regard to the substantive outcome of the Section 4(c)(2) Review and Critical Habitat Rulemaking required pursuant to Paragraphs 1 and 2 of this Agreement. Plaintiffs may not use a motion to enforce the provisions of this Settlement Agreement or any similar motion, such as a motion to compel compliance, to seek judicial review of the substance of any final agency action.

8. The dismissal of the Murrelet Case shall not create, support or constitute a defense to any claims AFRC may have against any final regulation revising critical habitat, provided, that any challenge AFRC brings against such regulation shall be brought solely by the filing of a new Complaint, preceded by any necessary 60-day notice of intent to sue in accordance with 16 U.S.C. § 1540(g).

9. The Service agrees that AFRC is entitled to reimbursement of reasonable attorney's fees and costs, as provided in 16 U.S.C. § 1540(g) up to and including the date of execution of this agreement. The Parties agree to attempt to resolve AFRC's claim for fees and costs expeditiously and without the need for Court intervention. This paragraph does not apply to costs or attorney's fees incurred with regard to any subsequent legal challenge to any revised critical habitat designation or the Section 4(c)(2) Review.

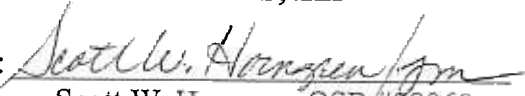
10. Each undersigned representative of the Parties hereto certifies that he or she is fully authorized to enter into and execute the terms and conditions of this agreement. **None of the** provisions or obligations of this Settlement Agreement shall become binding and effective unless and until the Court enters the Stipulated Order Approving Settlement and Dismissing Case ("Order")

filed concurrently with this Settlement Agreement and Stipulation of Dismissal, or a substantially similar order providing for the dismissal with prejudice of the Murrelet Case. The Effective Date of this Agreement shall be the date the Court enters the Order.

Dated: January , 2003.

HAGLUND KIRTLEY KELLEY
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By:


Scott W. Horngren, OSB #88060

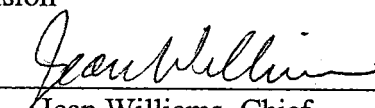
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Dated: January 13, 2003.

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